IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. .

SOUTHERN POWER COMPANY, PETITIONER,

vs.

NORTH CAROLINA PUBLIC SERVICE COMPANY, CITY OF GREENSBORO, AND CITY OF HIGH POINT, RESPONDENTS.

MOTION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Comes now the Southern Power Company, petitioner, by its attorneys, and moves this honorable court that it will by certiorari or other proper process, directed to the honorable, the judges of the Circuit Court of Appeals of the United States for the Fourth Circuit, require said court to certify to this court for its review and determination a certain suit in

the said Circuit Court of Appeals lately pending, wherein petitioner, Southern Power Company, was appellee and the said North Carolina Public Service Company, City of Greensboro, and City of High Point were appellants, and to that end the petitioner now tenders herewith its petition and brief and a certified copy of the entire record in the said cause, including the proceedings in the said Circuit Court of Appeals

R. V. LINDABURY,
W. S. O'B. ROBINSON, JR.,
E. T. CAUSLER,
WM. P. BYNUM,
R. C. STRUDWICK,
Attorneys for Petitioner.

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SOUTHERN POWER COMPANY, *Petitioner,*

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NORTH CAROLINA PUBLIC SERVICE COMPANY, CITY OF GREENSBORO, and CITY OF HIGH POINT, *Respondents.*

NOTICE.

To the North Carolina Public Service Company and to Messrs. King, Sapp and King and A. L. Brooks, its attorneys; to the City of Greensboro and to Charles A. Hines, Esquire, its attorney, and to the City of High Point and to Dred Peacock, Esquire, its attorney:

This is to notify you that the petitioner will on the 2d day of October, 1922, present to the Supreme Court of the United States, in its court-room, in Washington, D. C., its motion for a writ of certiorari upon its verified petition and a duly certified copy of the entire record in this suit, and a copy of said motion and of the said petition and of the brief accompanying the same are herewith delivered to you.

This the — day of ——, 1922.

SOUTHERN POWER COMPANY,
By R. V. LINDABURY,
W. S. O'B. ROBINSON, JR.,
E. T. CAUSLER,
WM. P. BYNUM,
R. C. STRUDWICK,
Its Attorneys.

The foregoing notice and delivery of a copy thereof and of the motion and petition for writ of certiorari and of the brief are hereby acknowledged this the — day of ——, 1922.

Attorneys for Respondents.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

SOUTHERN POWER COMPANY, *Petitioner*,

vs.

NORTH CAROLINA PUBLIC SERVICE COMPANY, CITY OF GREENSBORO, and CITY OF HIGH POINT, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES FOR THE FOURTH CIRCUIT.

To the honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Southern Power Company, files this its petition for a writ of certiorari to review a decision of the Circuit Court of Appeals of the United States for the Fourth Circuit made and entered in this suit on May 10, 1922 (petitioner's application for rehearing denied July 10, 1922), and in support of its petition it respectfully shows unto this court as follows:

Summary of the Matter Involved.

This suit was instituted by the respondents against the petitioner in the Superior Court of Guilford County, North Carolina, on September 2, 1920. It was denominated by the respondents an application for a writ of mandamus to compel petitioner to continue furnishing to the North Carolina Public Service Company for its own use and for distribution and

resale by it to its customers, including the cities of Greensboro and High Point and certain manufacturing establishments, electric current generated by the petitioner, as petitioner had been doing theretofore under certain special contracts which had expired by limitation of time.

Petitioner in apt time filed in the said Superior Court its petition and bond for the removal of the said suit to the District Court of the United States for the Western District of North Carolina on the ground of diverse citizenship, petitioner being a corporation created by the State of New Jersey and respondents being corporations created by the laws of the State of North Carolina. It alleged that the respondents by the use of the word mandamus sought to characterize the suit as a proceeding for a writ of mandamus, of which it was conceded the District Court would have no jurisdiction, yet it was in fact, as was shown by the facts alleged in the complaint, the object sought to be obtained, and the relief actually prayed for, a suit in equity for an injunction, of which the District Court did have jurisdiction, and that the said suit was therefore properly removable into that court. The said Superior Court on September 11, 1920, refused the petition to remove, and, upon appeal, the Supreme Court of the State, two justices dissenting, affirmed this ruling.

Petitioner, on September 15, 1920, caused a transcript of the record from the said Superior Court to be docketed in the said District Court and thereafter filed its answer there. The respondents, on December 20, 1920, moved in the said court to remand the said suit to the State court. This motion was denied, and thereafter the said District Court made an order enjoining respondents from proceeding further with the said suit in the courts of the State.

The suit was heard in the District Court at Greensboro, North Carolina, June 16, 1921. At the trial respondents (plaintiffs) introduced no evidence, but made a motion for judgment in their favor upon the pleadings, which was denied. Petitioner (defendant) thereupon introduced evidence in support of the affirmative defenses and counterclaims alleged in its answer. Upon this evidence and upon consideration of the whole case the District Court made certain findings of fact, in part as follows:

(1) That the defendant (Southern Power Company) has never dedicated its property to the public use of selling electricity to other public utility companies for resale and distribution by the said companies; that while the defendant has in some cases sold electricity to other public utility companies to be resold and distributed by them and has in other cases sold electricity to municipalities for the use of such municipalities, their citizens and inhabitants, all such sales have been made under special contracts in each case particularly limiting and defining the amount and character of electricity sold by the defendant, the time during which the same should be sold and delivered, and the terms and conditions of the sale and delivery thereof.

(2) That the North Carolina Public Service Company by its charter has the right to secure, develop, and operate hydroelectric plants and to generate electricity and sell and distribute it; that the powers granted the North Carolina Public Service Company in this respect are the same as those possessed by the Southern Power Company.

(3) That the North Carolina Public Service Company sells and distributes electricity that has been purchased from the defendant in competition with the defendant.

(4) That the defendant (Southern Power Company) did heretofore contract and agree with the High Point Electric Power Company to sell it electricity for its use and for resale and distribution at High Point, North Carolina, and with the Greensboro Electric Company for the sale of electricity for its use and for resale and distribution at Greensboro, N. C.; that the complainant, North Carolina Public Service Company, thereafter acquired the property and franchise of each of said companies and succeeded to the rights of each under its contract with the defendant for the purchase of electricity as aforesaid; that the contract originally made with the High Point Electric Power Company expired in December, 1919, and the contract originally made with the Greensboro Electric Company expired in January, 1920; that prior to the expiration of said contracts the defendant offered to enter into further contracts with the complainant, North Carolina Public Service Company, for the sale of electricity at High Point and Greensboro at the rates then established and in force by the defendant and at which it was then contracting with other customers for similar service, but which said rates were one mill a kilowatt hour in advance of the price which the defendant was charging the Southern Public Utilities Company for the sale of electricity at Charlotte, North Carolina, under a contract which had been entered into between the defendant and the Southern Public Utilities Company prior to the adoption by the defendant of the rates in force at and shortly prior to the expiration of the aforesaid contracts to which the complainant, North Carolina Public Service Company, had succeeded; that the North Carolina Public Service Company contended that it was entitled to contract with the defendant for the purchase of

electricity at Greensboro and High Point at the same rate per kilowatt hour which the defendant was charging the Southern Public Utilities Company for electricity at Charlotte, N. C., under the contract aforesaid, notwithstanding the fact that said contract was made and entered into prior to the adoption by the defendant of the rates in effect at the time of the expiration of said complainant's contracts, and that the defendant was charging said Southern Public Utilities Company and other customers a higher rate at places other than Charlotte, and the North Carolina Public Service Company declined to enter into further contracts with the defendant at the defendant's rates then in effect; that after the expiration of the said original contracts the defendant continued during the year 1920 to sell and deliver electricity to the complainant, North Carolina Public Service Company, for its use and for resale and distribution at Greensboro and High Point under and pursuant to the terms of the letters attached to and made a part of the bill of complaint and identified as Exhibits "A" and "B" (Record, pages 465, 466, and 467).

The said court thereupon entered its decree, which, in part, was as follows:

I.

That the complainants have no legal right to require and compel the defendant to sell and deliver electricity to the complainant, North Carolina Public Service Company, for resale and distribution by said North Carolina Public Service Company to said cities of Greensboro and High Point and their citizens and inhabitants and to the other customers

of said North Carolina Public Service Company, and that the complainants are not entitled to have the defendant enjoined from discontinuing the sale and delivery of electricity to said North Carolina Public Service Company for such uses and purposes.

II.

That the North Carolina Public Service Company is entitled to require the defendant to sell and deliver to said North Carolina Public Service Company at the terminal or delivery point at which the defendant has heretofore sold and delivered it electricity for use by the complainant as a motive power in operating and propelling the street-railway systems operated by said complainant in the cities of Greensboro and High Point and the vicinities thereof upon the terms and conditions hereinbefore recited and set out in this decree.

From this decree respondents appealed to the Circuit Court of Appeals for the Fourth Circuit. On May 10, 1922, that court (Waddill, judge, dissenting) rendered its decision. The Southern Power Company filed a petition for rehearing, which was entertained and considered and was denied on July 10, 1922. In the said decision that court held that the suit, though denominated one for mandamus, was in reality a suit in equity for an injunction; that it was therefore a suit of which the District Court of the United States had jurisdiction to hear and determine and that it was properly removed into that court; that the District Court properly refused to remand said suit, and that it committed no error in enjoining further proceedings by the respondents

in the State court after the transcript of the record had been docketed in the District Court of the United States. The Circuit Court of Appeals further held and decided, however, that the said District Court did err in holding that the respondents had no right to require petitioner to furnish to the North Carolina Public Service Company current for resale by it to the cities of Greensboro and High Point, their citizens and inhabitants, and to its other customers, including manufacturing establishments, and modified said decree and order and directed petitioner to continue to furnish the North Carolina Public Service Company electric current generated by petitioner for resale and distribution by the North Carolina Public Service Company to its said customers and consumers substantially as it had done theretofore.

In this portion of the decision of the Circuit Court of Appeals petitioner alleges there is error and asks this court to review it and to correct said error by certiorari. Petitioner did not appeal from and does not now complain of that portion of the decree of the District Court which required it to furnish to the North Carolina Public Service Company electric current for its own use in operating its street railway system.

Petitioner does not deny that it owes a duty to the public, including the citizens of Greensboro and High Point, to furnish them electric current for domestic, manufacturing, and municipal purposes, and it has always avowed its readiness and ability to do this if a franchise permitting this were granted to it by the said cities.

It does not contend that in furnishing said current for such consumption it is not subject to regulation by the proper authority, as are other public service companies. It

does not contend that in furnishing current as aforesaid it can discriminate as to said consuming public.

The said Circuit Court of Appeals by its decision aforesaid in effect held and decided that the petitioner, a public-service corporation, in the absence of a contract owes to the respondent North Carolina Public Service Company, a similar public service corporation, the duty of furnishing it electric current manufactured and generated by the petitioner, for resale and distribution to the public by the North Carolina Public Service Company at a profit to it, and in competition with the petitioner, in derogation of petitioner's right to distribute its own product to the public through its own instrumentalities or instrumentalities of its own selection, such distribution by the petitioner being subject to regulation by the proper authority and without discrimination.

Reasons Relied upon for the Allowance of the Writ of Certiorari.

The question presented in this petition is of grave and vital importance, both to the parties and the public at large. The effect of the said decision, if allowed to stand, is highly injurious to the business of petitioner for the reason that it enables every independent vendor or competitor of petitioner to engraft itself upon petitioner as a parasite or incubus, sapping its electric power for resale by it at a profit whenever it may be found profitable so to do. The consuming public will also suffer from this decision because the necessary effect of it is to add to the cost of the commodity (the electric current) not only the profit which the producing company is entitled to receive but the super-added profit of such in-

dependent vendor or competitor from whom the consumer buys directly.

It is also respectfully submitted as a reason for allowing this writ that the effect of this decision is to infringe the constitutional rights of petitioner as set up in the answer, by depriving it of its property without due process of law and also depriving it of its freedom of contract; rights guaranteed to it by the Constitution of the United States. The trial court found, and upon uncontradicted evidence, that the petitioner has never dedicated its property to the supplying of electric current to independent vendors. Petitioner respectfully submits that this finding of the District Court is the only one properly deducible from the evidence, and that the finding of the Circuit Court of Appeals to the contrary finds no support in the record and is erroneous. To support its contention in this respect the petitioner here calls attention to the evidence upon this material point as disclosed by the record. This evidence shows how the current generated by the petitioner has been disposed of; that no more thereof has been disposed of to public-service utilities for resale than here appears, and it shows further that no such sale has been made, except under special contracts; that such sales constitute but a small part of the business, and that in no sense has petitioner ever become a wholesale manufacturer of electric current engaged in selling its product to public utility companies as a business. The record shows (uncontradicted testimony of W. S. Lee, vice-president of the petitioner) that for twelve months ending April 20, 1921, the petitioner sold 595,916,911 kilowatt hours (Record, page 141). It also shows that of this amount 6,600,400 kilowatt hours were distributed through the North Carolina Public

Service Company to High Point and 8,270,600 kilowatt hours to Greensboro (Record, pages 143 and 144). That in addition to the North Carolina Public Service Company the petitioner sold current for resale to the Leaksville, Hillsboro, and Norwood Power and Light Companies in North Carolina and to the Lancaster Light and Power Company in South Carolina. The contracts with the North Carolina Companies appearing in the record indicate that the amount supplied to them is small. This witness also says that the petitioner is supplying current to approximately three hundred cotton mills (Record, page 173). Also to some other industries. It also supplies current to a number of municipalities for public and domestic use (Record, page 175).

In 1914 the Southern Public Utilities Company was formed. Prior to that time the Southern Power Company had contracts under which it was supplying domestic consumers in a number of towns. These contracts were thereupon turned over to the Southern Public Utilities Company, which has since been supplying them with current obtained from the petitioner. The Southern Public Utilities Company is owned and controlled by the same stockholders who own and control the Southern Power Company. The two companies are affiliated and have offices together at Charlotte, N. C. (Record, page 179).

The Circuit Court of Appeals refers to the Southern Public Utilities Company as an "offshoot" of the petitioner and controlled by it.

From the foregoing it appears that the petitioner sells from ninety to ninety-five per cent of its current (including that sold through the Southern Public Utilities Company) direct to consumers, and that it does not wholesale its current

in the sense of selling it to retailers for resale except to four or five companies who obtain it in relatively small amounts under contracts which limit their supply both as to quantity and time.

As bearing directly upon this phase of the case, attention is here called to the following testimony of Mr. Lee:

> Q. What are the conditions under which the Southern Power Company sells electricity to other public utility companies?
>
> A. We have made contracts with a few public utility companies in which we agreed to furnish them power for their requirements under terms of contract defining the different amounts.
>
> Q. Does the Southern Power Company sell power to the other public utilities companies except under special contract?
>
> A. No sir, unless you would term the contract with the North Carolina Public Service Company; that is the only one we have.
>
> Record, page 145.

> Q. Please state how many public service companies in North Carolina the Southern Power Company has built its transmission lines up to and connected with and is now engaged in furnishing current to in North Carolina, and please name them?
>
> A. We have the Southern Public Utilities, the Piedmont Company of Burlington, and we have a few others.
>
> Q. You have one at Leaksville?
>
> A. Yes sir, a small amount of power is sold to a private concern that delivers it near Spray, perhaps at Norwood, a small town that does the same thing, and one at Hillsboro.

Q. How many do you furnish, and name them, of local public utilities in South Carolina?

A. We have the Southern Public Utilities in South Carolina, and the Lancaster Light & Power Company.

Q. These are the only two?

A. I am not sure of that. I was trying to think. That is a very small part of our business, but we serve them. They all, however, have contracts and are working under contracts with this company.

Record, pages 167 and 168.

The trial court further found upon uncontradicted evidence that the North Carolina Public Service Company is a competitor of petitioner, being engaged in the sale of electric current in the same territory in competition with it. It also appears from the evidence without contradiction that petitioner is and has been at all times ready, willing, and able to serve through its own instrumentalities the needs of all consumers subject to regulation by the proper authority and without discrimination.

If this decision stands, the North Carolina Public Service Company can place itself in competition with petitioner throughout the entire territory in which petitioner operates and thereby constitute itself a distributor of the electric current manufactured and generated by the petitioner at its plants. Every similar independent vendor now existing or hereafter organized can do the same, and petitioner will be met on every side by those who are engaged in the same business and are competing with it at its expense, to the grave injury and damage of its business. The decision sought to be reviewed contravenes, as we respectfully sub-

mit, the well-settled principles of law announced by the decisions of this court.

Express Cases, 117 U. S., 1.

Donovan *vs.* Pa. Ry. Co., 199 U. S., 279.

L. & N. R. R. Co. *vs.* Naval Stores Co., 198 U. S., 483.

These decisions of this court were followed in North Carolina by the Supreme Court of that State in the case of Express Company *vs.* Railroad, 111 N. C., 463.

From the decisions in the foregoing cases and from many others which might be cited, we submit that the following principles have been settled by this court with regard to the questions presented upon the record:

1. A public-service corporation is entitled to serve the public through its own instrumentalities or those of its own selection and cannot be compelled against its will to select another such corporation as an agency for its service.

2. A public-service corporation cannot be compelled against its will to give over its property or the use of its facilities to another such corporation, to be used by it in the discharge of its corporate duties.

3. A public-service corporation cannot be compelled to aid a competitor in the promotion of its business.

It is respectfully submitted that the decision of the Circuit Court of Appeals for the Fourth Circuit, herein referred to, contravenes and is inconsistent with the foregoing principles of law, and that it ought to be reviewed by this court, and that the writ of certiorari for that purpose should be allowed. Your petitioner furnishes as Exhibit "A" to this

petition a certified copy of the entire transcript of the record in this case, including the proceedings in the Circuit Court of Appeals for the Fourth Circuit.

SOUTHERN POWER COMPANY,
By R. V. LINDABURY,
W. S. O'B. ROBINSON, JR.,
E. T. CAUSLER,
WM. P. BYNUM,
R. C. STRUDWICK,
Attorneys for Petitioner.

STATE OF NORTH CAROLINA,
County of Guilford:

Before me, the undersigned notary public in and for the foregoing county and State, personally came and appeared Wm. P. Bynum, who, being duly sworn, says that he is one of the attorneys for the petitioner herein; that he knows of the proceedings had and the facts stated in the foregoing petition; that the same are true and correct to the best of his knowledge and belief.

WM. P. BYNUM,

Subscribed and sworn to before me this the 21st day of August, 1922.

MABEL H. KASE,
[SEAL.] *Notary Public.*

My commission expires March 31, 1924.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

SOUTHERN POWER COMPANY, *Petitioner,*

vs.

NORTH CAROLINA PUBLIC SERVICE COMPANY, CITY OF GREENSBORO, and CITY OF HIGH POINT, *Respondents.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The Circuit Court of Appeals affirmed the ruling of the United States District Court, which held, in accordance with petitioner's contention, that the suit, though called in the complaint an application for a writ of mandamus, was in reality a suit in equity for an injunction, and that it was therefore (diversity of citizenship and the requisite jurisdictional amount appearing) properly removable from the State court into the said District Court.

It also affirmed the order made by the said District Court at the instance of petitioner enjoining further proceedings by the respondents in the State court.

These matters are therefore eliminated from consideration here.

The question now presented would seem to be: "Did the Circuit Court of Appeals err in deciding and adjudging that upon the state of facts disclosed in the record petitioner owed to the North Carolina Public Service Company the duty of furnishing electric current, manufactured and generated by the petitioner, to the North Carolina Public Serv-

ice Company for distribution and resale by the latter company at a profit to it?" Petitioner will support its application for a writ of certiorari to review this decision by endeavoring to show that it contravenes or ignores well-settled principles of law applicable to cases of this nature, and that it is a decision of such grave and vital importance, not only to the petitioner, but to the public, as to require correction in this method.

I.

The following facts are admitted upon the record or found by the trial court upon undisputed evidence:

The North Carolina Public Service Company (of North Carolina) is a public-service corporation, and by its charter it is authorized and empowered, among other things, to secure, develop, and operate hydroelectric plants and to generate electric current and to sell and distribute it. The powers granted to the Southern Power Company (of New Jersey) are in this respect the same as those possessed by the North Carolina Public Service Company (Record, page 466). There is this difference, however, between the two companies: The Southern Power Company upon receiving these chartered powers undertook, by exercising them, to discharge the obligation to the public which it had assumed; it devoted its resources, energy, and skill to manufacturing and generating hydroelectric power by the erection of dams on the Catawba River, North Carolina, and the installation of machinery and of a system of distributing this current to the consuming public. The North Carolina Public Service Company has failed to exercise the like powers conferred upon it; it has built no dams; it has installed no machinery; it

generates or manufactures no electric current, either for its own use or for sale to the public. Like the slothful and unprofitable servant of old, it has kept this talent laid up in a napkin.

On November 21, 1908, the Southern Power Company made a contract with the High Point Electric Company whereby it agreed to furnish said company electric current for its own use and for resale for ten years upon certain specific terms and conditions (Record, page 216). On December 3, 1908, the Southern Power Company entered into a contract with the Greensboro Electric Company whereby it agreed to furnish to it electric current for its own use and for resale for ten years upon certain specified terms and conditions (Record, page 235). Each of these contracts contains the following provision: "All contracts made by the said consumer for such retailing of said electric power shall be subject to this contract and the liability of the power company for any purpose shall not be considered to extend to any person or corporation other than said consumer."

The North Carolina Public Service Company thereafter acquired the property and franchises of each of these companies and succeeded to the rights of each under the said contracts.

Shortly before the expiration of the said contracts the Southern Power Company offered to make other contracts of a like import for furnishing electric current to the North Carolina Public Service Company, but for a shorter period of time and at a somewhat higher rate (Record, page 466).

The North Carolina Public Service Company refused to accede to the terms proposed by the Southern Power Company and no other contracts were ever made with it.

Pending negotiations for this purpose, the North Carolina Public Service Company notified petitioner that it could generate its own supply of electric current more advantageously than it could purchase it from petitioner, either from coal or development of a hydroelectric plant at High Rock, on the Yadkin River, N. C., and that it proposed so to do (Record, pages 144, 145, and 251).

After the expiration of these contracts and during the year 1920 the Southern Power Company continued to furnish current to the North Carolina Public Service Company in order that during this extended period it might put itself in a position to generate its own power. It notified the North Carolina Public Service Company, however, that at the expiration of the said year, to wit, on January 1, 1921, it proposed to discontinue the said service. On April 26, 1920, the Southern Power Company applied to the city of Greensboro for a franchise to enable it to distribute and sell to the said city and its inhabitants electric current. The City declined to grant this franchise. On September 3, 1920, the present suit was begun in the Superior Court of Guilford County, North Carolina. The nature of the action and the course of the litigation in the said Superior Court and in the Supreme Court of North Carolina, in the District Court of the United States, and in the Circuit Court of Appeals, culminating in the decision and judgment of that court now sought to be reviewed, appear at large in the record, have been summarized in the pending petition, and will not be repeated here.

The North Carolina Public Service Company and the Southern Power Company appear to be the only parties to this record who are substantially interested in the result of

this suit. The interests of the two cities, Greensboro and High Point, are incidental, if they have any real interest at all (Record, page 464). It appears that they have contracts under which they have been purchasing electric current from the North Carolina Public Service Company, which it secures from petitioner and resells to the cities at a considerable profit. It further appears that petitioner is ready, able, and willing to supply them directly with the same current if they will permit it to do so, and it is difficult to see how they are beneficially interested in insisting upon the interjection of a middleman into the transaction. The petitioner does not deny its obligation to furnish the North Carolina Public Service Company electric current for its own consumption, as in operating its street-railway system. It does not deny its obligation to furnish current to cities and towns to be by them distributed and resold to their inhabitants. It has always recognized and acknowledged the distinction between a municipal plant operated under legislative authority for a public purpose and restricted in its business to territorial limits of the town and the business of a private corporation organized and operated for private gain and unrestricted as to the territory in which it may operate. This distinction is adverted to in the case of Springfield Gas & Electric Co. *vs.* Springfield, decided by this court November 21, 1921, and reported — U. S., — (Record, page 184).

The learned Circuit Court of Appeals inadvertently misstated the position of petitioner in this particular. Petitioner does not deny that in rendering such service in the State of North Carolina it is subject to regulation by the proper authorities, and it admits that it cannot discriminate in its rates. Its position is that petitioner, in the absence of

a contract, owes to the North Carolina Public Service Company and other similar public-service corporations (independent vendors) no duty to furnish them electricity for resale and distribution to the public at a profit, and in competition with petitioner, in derogation of petitioner's right to distribute its own electricity to the public through its own instrumentalities or instrumentalities of its own selection. It earnestly contends that the learned Circuit Court of Appeals erred in holding to the contrary.

The correctness of the rule just stated is established by the highest authority.

Express Company Cases, 117 U. S., 1.

L. & N. R. R. Co. *vs.* West Coast Naval Stores Co., 198 U. S., 483.

Donovan *vs.* Pa. R. R. Co., 199 U. S., 279.

Express Co. *vs.* Railroad, 111 N. C. Rep., 463.

The principal question presented now seems to be whether or not this rule of law so clearly stated in and so firmly established by the decisions of this court is applicable to the instant case.

The learned Circuit Court of Appeals gave a qualified assent to the correctness of this proposition, but denied its application to the North Carolina Public Service Company upon the facts appearing in this record. It exempted that company (as we understand its opinion) from the operation of this rule chiefly upon the following grounds:

(1) It held that one of the chartered powers of petitioner was the right of eminent domain; that the conferring upon it of this right imposed upon it the correlative duty of serving the public in the exercise of its corporate power (Opin-

ion, page 3). And it held further that the North Carolina Public Service Company, in its capacity as an independent vendor, was a part of the public referred to.

(2) It held further that the North Carolina Public Service Company is not a competitor of the petitioner within the meaning of the rule referred to.

(3) It held that petitioner, one of whose chartered powers is the furnishing of electric current to independent vendors, is shown by the facts appearing in the record to have definitely undertaken and entered upon this particular service, and that it has thereby dedicated its property to the service of all independent vendors, including the North Carolina Public Service Company.

As to the First Ground.

Petitioner contends that this principle of law has no application to the North Carolina Public Service Company in its capacity as public vendor. The North Carolina Public Service Company is not one of the public—that is, the general consuming public—to whom petitioner admits it owes a duty. It is a middleman seeking forcibly to interject itself between the ~~purchaser~~ producer of the commodity and the general consuming public for its own selfish and self-serving purposes. Its interests are antagonistic to the interests of the public properly so called, in that its chief purpose in demanding this current from petitioner is not to consume it, but to exact and realize a profit from the consumer in the sale of the commodity to him by it.

The learned court did not advert in this connection to the fact that the same power of eminent domain conferred upon

the Southern Power Company is likewise conferred upon the North Carolina Public Service Company. If the North Carolina Public Service Company had also exercised and availed itself of its corporate powers in this respect and was, by reason thereof, a producer as well as a distributor of electric current, it would scarcely be contended that it could then compel petitioner to supply it with current for distribution and resale by it. This seems to be conceded in the opinion of the learned Circuit Court of Appeals (Opinion, page 7). The voluntary failure of the North Carolina Public Service Company to act, to exercise its corporate powers in this respect, cannot operate to make it a member of the general public entitled to exact this service from petitioner when if it had so acted it would not be so entitled. It is submitted that by its non-action the North Carolina Public Service Company can impose no additional duty upon petitioner.

As said by Chief Justice Waite in the Express Company Cases, 117 U. S., 28: "If the general public were complaining * * * different questions would be presented."

Much emphasis is laid in the opinion of the Circuit Court of Appeals upon the fact that its charter conferred upon petitioner the right of eminent domain. It is nowhere charged that the petitioner has exercised this or any other chartered power oppressively, unlawfully, or in any unusual manner. There is nothing in the record to justify the assertion or the assumption that it has exercised it for the purpose of serving independent vendors. The possession and the exercise of this right is often referred to by the courts as material in determining whether a corporation is a private corporation entitled to do business as such, or is a public-service corporation owing the duty of serving the public (properly so called) at

reasonable rates without discrimination and subject to proper regulation.

As petitioner has at all times admitted that it is such public-service corporation, owing said duties and subject to the said regulation, it is not perceived how the possession of the exercise of the power of eminent domain is relevant or significant in the solution of what seems to be the crucial question in this case, to wit, is the North Carolina Public Service Company in its capacity of independent vendor of electric current one of the general public to whom petitioner owes duties in like manner as it does to the general consuming public?

It is submitted that by the exercise of the power of eminent domain the Southern Power Company did not render itself liable to the imposition of this alleged duty upon it, if otherwise it would not have been so.

In so exercising it performed a duty imposed by its charter. It should not be penalized for so doing.

The learned Circuit Court of Appeals says further that the petitioner by exercising this right of eminent domain and by building and operating its extensive properties, has acquired exclusive control of the generation of electric current in the territory in which the North Carolina Public Service Company operates. If this were true, it is difficult to see how this would have any bearing upon the question presented, the status of the North Carolina Public Service Company and the measure of the duty owed to it by the petitioner, no unlawful methods on its part being alleged.

The facts, however, as we submit, do not sustain the statement referred to. It is said in the opinion that the rivers and streams in North Carolina are capable of generating

1,095,000 horse-power, and that petitioner has developed 60,000 horse-power. It appears that its developments are entirely upon one river, the Catawba. The Yadkin and the Roanoke rivers are both closer to the territory embracing Greensboro and High Point than the Catawba. There is as much hydro-electric power capable of development on each of these streams as on the Catawba River (Record, pages 147, 148).

The North Carolina Public Service Company has the same powers, including that of eminent domain, to develop hydro-electric powers on these streams or elsewhere as the petitioner has to develop the power on the Catawba River. It has failed and neglected to avail itself of its power of eminent domain and other chartered powers and the opportunity afforded it to erect a plant and put itself in a position to manufacture, generate, and distribute electric current, though it notified petitioner that it was its intention to do so. Its non-action in this particular, for which petitioner is in no way responsible, cannot, we submit, operate in any manner to change its relation to petitioner to confer upon it any right which otherwise it would not have nor impose upon petitioner any duty or burden from which otherwise it would be exempt.

As to the Second Ground.

It is respectfully submitted that the learned Circuit Court of Appeals erred in holding that the North Carolina Public Service Company is not a competitor of petitioner in the distribution and resale of electric current within the meaning of the rule relied on by petitioner. Petitioner's contention that upon the whole record it was and is such a com-

petitor seems clearly established. The District Court, upon the undisputed evidence, found as a fact that it was (Record, page 466). The Circuit Court of Appeals says (Opinion, page 9) that if the North Carolina Public Service Company is a competitor of petitioner it is so in a restricted sense. It is submitted that the extent of the competition is not the test. If it is a competitor at all, the rule, that one competitor in business cannot demand service of another for promotion of its business, applies. Central Stock Yards *vs.* L. & N. R. R. Co., 192 U. S., 568.

If this were not so, how could the line be drawn between competition within the rule and competition not within it? If it is seeking or endeavoring to gain what another (the petitioner, Southern Power Company) is endeavoring to gain at the same time, it is a competitor. Such competition both within and without the limits of the two cities of Greensboro and High Point clearly appears from the undisputed evidence (Record, pages 197, 199, 200, and 203).

In this connection the Circuit Court of Appeals mentions as material the fact that in the distribution and sale of its current the Southern Power Company uses an instrumentality of its own selection, the Southern Public Utilities Company, said by the court to be an offshoot or subsidiary of petitioner. If such is the case, does the petitioner thereby in any manner transcend its rights or violate the law or in any manner affect the status or the rights of the North Carolina Public Service Company either for better or for worse?

Under its charter petitioner assumed the obligation of generating, distributing, and selling to the public electric current. Its right to select its own agencies for the accomplishment of this purpose would seem to be well established;

the general public has no reason to complain of its exercise of this right and has never complained, and its competitor, the North Carolina Public Service Company, has, as we submit, no right to question it.

Speaking of the duties of public-service corporations where a similar question was presented, Chief Justice Waite said (Express Company Cases, 117 U. S., 1, 24):

> "So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security."

To the same effect are the following:

Atchison, Topeka & Santa Fe Ry. Co. *vs.* Denver & New Orleans R. R. Co., 110 U. S., 667.

Lewis on Eminent Domain, 3d edition, section 440.

L. & N. R. Co. *vs.* Central Stock Yards, 212 U. S., 132.

As to the Third Ground.

Does the record justify the conclusion announced by the Circuit Court of Appeals that the petitioner has, by custom or usage or otherwise, dedicated its property to the service of furnishing electric current to independent vendors, in-

cluding the North Carolina Public Service Company? The learned court says in this connection (Opinion, page 10):

> "But when a corporation has definitely undertaken and entered upon a particular service authorized by its charter, which conferred the right of eminent domain, the obligation to perform the service is complete, its rates and terms are subject to regulation by public authority, and it must serve all alike."

Further it says:

> "In this instance the Southern Power Company has definitely undertaken, entered upon and continued the service of transmitting electric current to independent vendors thereof under the authority of its charter and for that purpose has exercised the power of eminent domain conferred by the State."
>
> Opinion, page 11.

The petitioner does not deny the correctness of the first of the foregoing excerpts from the opinion as a general proposition of law, but it does say that the facts as shown in this record do not justify its application here.

With regard to the second excerpt from the opinion just quoted, petitioner says that it is not supported by the facts disclosed in this record.

Petitioner's charter does not impose upon it the obligation to sell electricity to independent vendors. It merely gives petitioner permissive power to make such sales, just as it confers upon it the power of leasing to other corporations the right to string wires on its poles or to lease water rights.

The testimony is full, explicit, and uncontradicted that the petitioner has in no instance furnished current to inde-

pendent vendors such as the North Carolina Public Service Company, except under special contracts limiting the time for such service, the terms upon which it was to be supplied, and the rates to be charged, and restricting the force and effect of such contracts to the parties thereto in each particular instance (Record, pages 166, 167, and 143).

The substance of this testimony has been set forth somewhat at large in the petition for certiorari, to which reference is made. The finding of the trial court upon this evidence, that petitioner had never dedicated its property to the supplying of electric current to independent vendors for resale, is fully supported by this evidence, as petitioner contends, and the learned Circuit Court of Appeals was in error in overruling this finding of the trial court and holding to the contrary.

The finding of the Circuit Court of Appeals that there has been a dedication by petitioner of its property to the supplying of electric current to independent vendors seems to be unsupported by any evidence in the record, nor is there to be found in the record anything to support the statement of the Circuit Court of Appeals that petitioner has been, as a wholesaler, generally selling its current to other public utilities companies for resale, or that it is engaged in the business as a wholesaler, disposing of its current in the manner aforesaid. The evidence is undisputed that in no instance has petitioner ever sold any current to any other public-utility company except under special contract limiting the time, defining the amount, and specifying the price at which the current was to be furnished by it to that particular customer, indeed in express terms restricting to the parties to the particular contract all rights arising thereunder. It

also appears that its dealings with other public-utilities companies constitutes but a small part of its business. The learned Circuit Court of Appeals, in finding that the petitioner had so dedicated its property, seems, therefore, to have overlooked this direct and uncontradicted evidence, and further to have overlooked what this court has said and declared in a similar case was the force and effect of the furnishing of service by a public-utilities company under special contract.

If we understand the decisions of this court, the furnishing by petitioner of electric current under such special contracts, so far from establishing or tending to establish a custom or usage from which a dedication by petitioner might be inferred of its property to that use, negatives the existence thereof. In *Express Company Cases*, 117 U. S., 1, 27, this court says:

> "In all these voluminous records there is not a syllable of evidence to show a usage for the carriage of express companies on the passenger trains of railroads, unless specifically contracted for. * * * It has been shown, and in fact it was conceded upon the argument, that down to the time of bringing these suits no railroad company had taken an express company on its road for business except under some special contract, verbal or written, and generally written, in which the rights and duties of the respective parties were carefully fixed and defined. * * *
>
> "In this connection it has to be kept in mind that neither of the railroads involved in these suits is attempting to deprive the general public of the advantages of an express business over its road. The con-

troversy in each case is not with the public, but with a single express company. And the real question is not whether the railroads are authorized by law to do an express business themselves; nor whether they must carry express matter for the public on their passenger trains in the immediate charge of some person specially appointed for that purpose; nor whether they shall carry express freight for express companies as they carry light freight for the general public; but whether it is their duty to furnish the Adams Company or Southern Company facilities for doing an express business upon their roads the same in all respects as those they provide for themselves or afford to any other express company."

And further, page 28:

"The express companies that bring these suits are certainly in no situation to claim a usage in their favor on these roads, because their entry was originally under special contracts; and no other companies have ever been admitted except by agreement. * * * They were willing to begin to expand their business upon this understanding and with this uncertainty as to the duration of their privileges. The stoppage of their facilities was one of the risks they assumed when they accepted their contracts, and made their investments upon them. If the general public were complaining because the railroads refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented. As it is, we have only to decide whether these particular express companies must be carried notwithstanding the termination of their special contract rights."

The same rule of law is illustrated and applied by this court in Donavon *vs.* Penn. Company, 199 U. S., 279. In

this case Mr. Justice Harlan, delivering the opinion of the court upon a similar question, said:

> "Although its functions are public in their nature, the company holds the legal title to the property which it has undertaken to employ in the discharge of those functions. And, as an incident to ownership, it may use the property for the purpose of making profit for itself, such use, however, being always subject to the condition that the property must be devoted primarily to public objects, without discrimination among passengers and shippers, and not be so managed as to defeat these objects. It is required, under all of the circumstances, to do what may be reasonably necessary and suitable for the accommodation of passengers and shippers. But it is under no obligation to refrain from using its property to the best advantage of the public and of itself. It is not bound to so use its property that others, having no business with it, may make profit to themselves. Its property is to be deemed, in every legal sense, private property as between it and those of the general public who have no occasion to use it for purposes of transportation.
>
> "Here the defendants press the suggestion that they are entitled to the same rights as were accorded by special arrangement to the Parmelee Transfer Company. They insist, in effect, that, as carriers of passengers, they are entitled to transact their business at any place which, under the authority of the law, is devoted primarily to public uses—certainly at any place open to another carrier engaged in the same kind of business. But this contention, when applied to the present case, cannot be sustained. The railroad company was not bound to afford this particular privilege to the defendants simply because they had afforded a like privilege to the Parmelee Transfer

> Company, for it had no contractual relations with the defendants, and owed them, as hackmen, no duty to aid them in their special calling."

If it should finally be held that the petitioner has irrevocably dedicated its property to the use of independent vendors, including the North Carolina Public Service Company, by having in some instances made special contracts to furnish them with electric current, the consequences to its business and to the business of all like producers of this and other commodities would be disastrous in the extreme. If such is the law, the North Carolina Public Service Company or any other independent vendor of electric current can place itself in competition with petitioner throughout the entire territory in which petitioner operates, thereby constituting itself the distributor of the electric power manufactured and generated by petitioner.

As stated by Judge Waddill in his dissenting opinion (Opinion, page 19):

> "Appellee's (petitioner's) business is sustained by its receipts from the sale of power to its customers; and if the appellant, its direct competitor, engaged in the same business, can call upon appellee to furnish to it power to resell in competition with what it produces, how long could any business withstand such a strain? In the end the public would suffer, as no well organized and strong business could long provide against the disastrous consequences that would necessarily flow from such unbusinesslike and chaotic conditions. To be wholly without means would place one in quite as good, if not a better position than that of great strength, since it could secure without risk the benefits of the labor and capital of the strong until the latter was destroyed. A more dangerous blow could not

> well be struck at vested interests, and one that would eventually result in withholding capital necessary to start or maintain enterprises requiring large outlay."

Petitioner therefore respectfully submits that the grounds assigned by the learned Circuit Court of Appeals as a basis for its decision in this case are not tenable in view of the facts appearing upon the record and the rules applicable thereto; that the said decision is erroneous, and should be reversed.

II.

The petitioner is entitled to sell its electricity to the consuming public directly and through its own instrumentalities, and to require it to serve the public through the agency of the North Carolina Public Service Company would be to deprive it of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

> The uncontradicted evidence shows that appellee is engaged in the business of distributing to the consuming public—as well as generating—electricity. It has spent enormous sums of money in the construction of dams and hydroelectric plants, as well as steam plants, for the generation of electricity, and has also built lines and substations and other necessary parts of a well organized distribution system for the purposes of transmitting its electricity directly to the consuming public in the territory of Greensboro and High Point and has sought and still seeks to do so.
>
> There could, we submit, be no justification for depriving appellee of the right to distribute its own electricity to the consumer and to earn the profit there is in such distribution. The electricity which ap-

pellee generates is generated for use by the consuming public. To permit the North Carolina Public Service Company to take this electricity from appellee for the purpose of distributing it through its own instrumentalities, rather than to permit appellee to distribute it would work no change in the use to which the electricity is devoted but would merely enforce a transfer of appellee's property to the Public Service Company and give to the latter the right to earn the profit incident to the distribution of the electricity, and incidentally increase the cost to the consumer.

The foregoing argument is, as we submit, sustained by the following authorities:

Atchison, Topeka & Santa Fe R. Co. *vs.* Denver & New Orleans R. Co., 110 U. S., 667.

Memphis & Little Rock R. Co. *vs.* Southern Express Co., 117 U. S., 1.

L. & N. R. R. Co. *vs.* Central Stock Yards Co., 212 U. S., 132.

For the foregoing reasons it is respectfully submitted that this court should review the decision of the Circuit Court of Appeals in this case, and that a writ of certiorari for that purpose should be granted.

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